

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Pat Wood, III, Chairman;
William L. Massey, and Nora Mead Brownell.

Sagebrush

Docket No. EL03-121-000

ORDER GRANTING PETITION FOR DECLARATORY ORDER

(Issued June 6, 2003)

1. In this order, we consider a petition for a declaratory order filed by Sagebrush, owner of a transmission line used to transmit power generated by qualifying small power production facilities (QFs) located near Mojave, California. Sagebrush (or Applicant) asks the Commission to declare that, under the circumstances described in the body of this order, a transmission line currently used to transmit power exclusively by a number of wind power QFs may be used in the future to transmit power produced by non-QF exempt wholesale generators (EWGs) without affecting the QF status of any QF that continues to use its portion of the line. Sagebrush also asks us to declare that use of the line by these non-QFs will not subject the QFs to additional regulation under the Federal Power Act (FPA). As discussed below, we will grant Sagebrush's petition.

Background

2. Sagebrush is a California general partnership that owns a 46-mile, 220-kV radial transmission line and appurtenant facilities (Sagebrush Line) by which a number of wind-powered QFs located near Mojave, California (Sagebrush QFs) deliver power to the electric utility power purchaser, Southern California Edison Company (SoCal Ed). The owners of the Sagebrush QFs (Sagebrush QF Owners) each own one or more special purpose companies (Sagebrush Partners) that are the active partners in Sagebrush. Each Sagebrush QF Owner also owns, through a Sagebrush Partner, a portion of the Sagebrush Line, which is considered part of the corresponding QF.

3. The Sagebrush Partners entered into a non-profit partnership agreement, as described in Gamma Mariah, Inc., 44 FERC ¶ 61,442 (1988) (Gamma Mariah), which provides that Sagebrush Partners share ownership expenses and other costs associated with

operation and maintenance of the Sagebrush Line. Under the partnership agreement, Sagebrush Partners are not charged a fee for use of the Sagebrush Line. In addition, the partnership agreement states that only QF owners affiliated with the Sagebrush Partners may use the Sagebrush Line.¹

4. Eurus Toyo West Management, LLC (ETW) is the manager of the operation, servicing, maintenance and repair of the Sagebrush Line.

5. The Commission granted QF status to each of the Sagebrush QFs. The respective portion of the Sagebrush Line owned by each QF was considered part of each QF.²

6. Of the eight generators that utilize the Sagebrush Line, three are directly affiliated with Enron Corporation (Enron): Zond Windsystems Holding Company (Zond Windsystems), Victory Garden Phase IV Partnership (Victory Garden), and Sky River Partnership (Sky River). These three facilities are EWGs.³ These three facilities are the subject of proceedings in which findings that they have lost QF status for certain calendar years may be made.⁴ In addition, Enron, as part of a reorganization pursuant to Chapter 11 of the Bankruptcy Code, has transferred all of its interests in the three facilities to Wind Systems Trust, pursuant to a trust agreement. The facilities are seeking recertification under ownership of the trust. Sagebrush states, however, that it is possible that the three facilities may be transferred in the future to an entity that is an electric utility or an electric

¹Sagebrush states that the partnership agreements will be amended to allow co-owners of the line without QF status to use the line if the Commission grants the instant petition for declaratory order.

²Gamma Mariah, 44 FERC at 62,399; Zond Victory Garden Phase IV Development Corporation, 57 FERC ¶ 62,018 (1991); Zond Sky River Development Corp., 57 FERC ¶ 62,019 (1991).

³Sky River Partnership, 80 FERC ¶ 61,107 (1997); Victory Garden Phase IV Partnership, 80 FERC ¶ 61,108 (1997); Zond Windsystems Holding Co., 80 FERC ¶ 61,109 (1997).

⁴See Investigation of Certain Enron Affiliated QFs, et al., 101 FERC ¶ 61,076 (2002); Southern California Edison Company v. Enron Generating Facilities: Victory Garden Phase IV Partnership, Sky River Partnership, Cabazon Power Partners LLC, Zond Wind System Partners, Ltd. Series 85-A and Zond Wind System Partners, Ltd. Series 85-B, 101 FERC ¶ 61,313 (2002).

utility holding company for purposes of the ownership criteria for QF status contained in the Commission's regulations.

7. In addition, Sky River, Victory Garden, Zond Systems, Inc., Zond Windsystems Partners, Ltd. Series 85-A, and Zond Windsystems Partners, Ltd. Series 85-B (all of which are Enron affiliates) hold interests as co-tenants in certain interconnection and transmission facilities that interconnect with the Sagebrush Line. The interconnection and transmission facilities in question consist of the Tehachapi substation, an approximately 12-mile 230 kV transmission line from the Tehachapi substation to the Wilderness substation, and the Wilderness substation (TW facilities). The co-tenants own these facilities under a non-profit co-tenancy agreement with one other Sagebrush QF owner. Each of the TW facility co-tenants owns an undivided interest in the capacity of the TW Facilities that is proportional to the capacity of its generating facility.⁵ None of the TW Facility co-tenants is charged for use of the line, and the co-tenancy agreement provides that only power generated by QFs may be transmitted over the TW Facilities.

The Instant Filing

8. Sagebrush states that it seeks a declaratory order because of the regulatory uncertainty that might occur if the Enron-affiliated Sagebrush QFs cease to be QFs for any calendar year. Sagebrush therefore requests that the Commission declare that: (1) each of the remaining Sagebrush QFs will continue to be a QF, provided they otherwise continue to meet the Commission's requirements for QF status; (2) each portion of the Sagebrush Line dedicated to a Sagebrush QF that retains QF status, which portion will continue to be used exclusively to transmit power from that QF, will continue to be deemed to be part of the QF, and neither it nor the Sagebrush QF Owner will become subject to additional regulation as a public utility under the FPA; (3) each portion of the Sagebrush Line dedicated to a Sagebrush EWG, which portion will be used exclusively to transmit power from that Sagebrush EWG, will be deemed to be part of that Sagebrush EWG, and the Sagebrush EWG will not become subject to "additional" regulation as a public utility under the FPA;⁶

⁵The Commission certified the TW facilities as part of the QFs. Zond Victory Garden Phase IV Development Corporation, 57 FERC ¶ 62,018 (1991); Zond Sky River Development Corp., 57 FERC ¶ 62,019 (1991).

⁶Petition at 7. As to this point, we note that, as Sagebrush itself acknowledges, while EWG status can exempt an entity from the Public Utility Holding Company Act, EWG status in and of itself does not exempt an entity that would otherwise be a public utility under the Federal Power Act from regulation as a public utility under the Federal Power Act. See 15 U.S.C. § 79z-5a (2002); see also 16 U.S.C. §§ 824 et seq. (2000). That

(continued...)

and (4) no activities related to the ownership and operation of the non-QF portions of the Sagebrush Line will cause either the Sagebrush QFs or the Sagebrush EWGs to become subject to "additional" Commission regulation under the FPA as long as the Sagebrush Line is used exclusively to transmit power generated by the facilities owned by the Sagebrush QFs and the Sagebrush EWGs.⁷ Sagebrush seeks a similar assurance with respect to the TW facilities.

9. Sagebrush argues that the requested relief is appropriate and consistent with the public interest, and that it is consistent with applicable statutory and regulatory provisions. Sagebrush adds that there is no policy reason for the Commission to determine that QFs and EWGs may not share a transmission line under these circumstances, and states that, in the absence of the requested relief, Sagebrush QFs and Sagebrush EWGs would be required to create two separate structures to own and operate separate sets of interests in the same facilities, which would be unduly burdensome, wasteful, and inefficient.

Notices, Interventions, and Protests

10. Notice of the Applicant's filing was published in the Federal Register, 68 Fed. Reg. 22,691 (2003), with protests and interventions due on or before May 9, 2003. None was filed.

Discussion

11. Under the circumstances presented, we will grant Sagebrush's petition as to QF status; if a Sagebrush QF loses its QF status, but is an EWG, each of the remaining Sagebrush QFs will continue to retain its QF status and its respective portion of the Sagebrush Line and TW facilities will continue to be part of the QF.⁸ Each remaining QF

⁶(...continued)

is, Sagebrush acknowledges that the Sagebrush EWGS will be public utilities under the FPA and that their power sales will be subject to Commission jurisdiction under Section 205 of the FPA, and that any transfer of their interests in the Sagebrush Line would be subject to Commission jurisdiction under Section 203 of the FPA. See Petition at 7 n.16. Sagebrush thus explains that it only seeks a declaration that the proposed arrangement "will not subject the Sagebrush EWGs to any regulation as public utilities beyond that normally applicable to EWGs." Id.

⁷See supra note 6.

⁸For the Sagebrush EWGs, similarly, their respective portions of the Sagebrush Line

(continued...)

will continue to own what it owned before one of its partners in the Sagebrush Line and TW facilities fell out of compliance with the requirements for QF status. That is, what each owns and will continue to own is an undivided interest in the Sagebrush Line and the TW facilities⁹ that are used and will continue to be used in a manner consistent with the requirements of 18 C.F.R. § 292.101(b)(1) (2003). This regulation defines a QF to include transmission lines and related equipment that are used, among other specified purposes, to transmit the QF's output to an electric utility purchaser of that output.¹⁰

12. The other issue presented is whether the loss of QF status by one or more of the Sagebrush QFs will result in "additional" regulation under the FPA. Under the circumstances presented, we will grant Sagebrush's petition as to the scope of regulation; we see no need for additional regulation under the FPA (*i.e.*, beyond what would normally be the case for a QF or an EWG¹¹) if a Sagebrush QF loses its QF status, provided that the entity is an EWG.¹² Currently partners to the Sagebrush Line and the TW facilities use their respective portions of the respective transmission facilities solely to transmit power from their respective generation facilities.¹³ Sagebrush states that, if a Sagebrush QF loses its QF status but is nevertheless an EWG, the Sagebrush Line and TW facilities will continue to be used as before, *i.e.*, each portion will still be used exclusively to transmit power from the generation facility to which it is dedicated, whether the facility remains a QF or is now only an EWG.

The Commission orders:

⁸(...continued)

and TW facilities will continue to be part of the EWGs.

⁹Each entity's interest in the Sagebrush transmission line and TW facilities is proportional to that entity's generation capacity.

¹⁰See Gammah Mariah, 44 FERC at 62,399; accord Oxbow Geothermal Corporation, 67 FERC ¶ 61,193 at 61,604-05 (1994).

¹¹See supra notes 6-7 and accompanying text; accord Petition at 7 & nn. 16-17.

¹²See supra note 10.

¹³Petition at 1, 3, 7, 8. Currently, as described above, the partners in these facilities are not charged to use the facilities and only pay for each partner's proportionate expenses.

The petition for declaratory order is hereby granted, as discussed in the body of this order.

By the Commission.

Magalie R. Salas,
Secretary.